



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 9, 1995

Mr. Andrew Martin  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-1088

OR95-253

Dear Mr. Martin:

The City of Austin (the "city") has asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. That request was assigned ID# 30079.

The city solicited proposals for a program to provide marketing and outreach services in connection with the Small Contractor Support Network Program. The city awarded a contract to Business Resource Consultants ("BRC"). An open records request was made for a copy of the city's request for proposal ("RFP") and the contract that the city entered with BRC. The city's letter indicates that the requestor was provided a copy of the RFP and all of the contract except for Exhibit B, an attachment to the contract. Exhibit B is BRC's proposal, which the city contends may be confidential under section 552.110 of the Government Code. As provided by section 552.305 of the Government Code, this office provided BRC the opportunity to submit reasons as to why its proposal should be withheld from disclosure. BRC identified various pages in its proposal as being confidential pursuant to sections 552.101 and 552.110.

Section 552.101 provides an exception for "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2. Both sections 552.101 and 552.110 provide an exception for information made

confidential by statute or judicial decision, but section 552.110 concerns a specialized category of information including trade secrets. We will consider the applicability of section 552.110 to the proposal at issue.

This office will accept a claim that information is excepted from disclosure under section 552.110 as a trade secret if a prima facie case is made that it is a trade secret, and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 592 (1991). In *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958), the Texas Supreme Court adopted the Restatement of Torts definition of a trade secret. Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

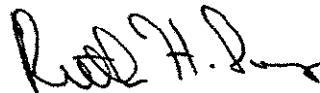
*Id. see also* Open Records Decision No. 522 (1989). This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983).

BRC provided evidence of the Restatement factors sufficient to establish a prima facie case as to the section titled "System Solution." BRC stated that the information is kept secret to the point that it is not provided even to customers or clients, and is designed in such a manner that clients would be unable to determine the system solution even though they participate in the program. BRC indicated that the system is the focus of its marketing and outreach team and provides the business its competitive advantage against competitors. We have marked this section, which must be withheld from disclosure. On the same page as the "System Solution" was a statement that BRC would meet with city officials concerning its approach. This statement does not concern trade secrets and may not be withheld.

As to the other information, no facts were provided to show how the Restatement factors apply, such as information detailing the specific measures taken by BRC to guard the information or how much money the company spent developing certain information. BRC also failed to make a prima facie case as to lists of its customers and customers of three other companies associated with BRC. The Restatement specifically provides that customer lists kept secret from competitors may be the type of information that is a trade secret. In Open Records Decision No. 552 (1990) at 3, this office determined that a prima facie case had been made that customer lists were protected trade secrets when evidence was provided with respect to the Restatement factors. This office has stated that customer information is not excepted from disclosure as a trade secret unless it is shown how the six Restatement factors apply. Open Records Decision No. 494 (1988) at 5. Since a prima facie case has not been made that the other information at issue is a trade secret, all of the information except for the "System Concept and Solution" portion must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

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Ref.: ID# 30079

Enclosures: Marked documents

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